



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for May 13, 2022

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BOARD DECISIONS

Appellant: Tracy Scanlin

Agency: Social Security Administration

Decision Number: [2022 MSPB 10](#)

Docket Number: CB-7121-17-0001-V-1

Issuance Date: May 10, 2022

Appeal Type: Request for Review of Arbitration Decision

Arbitration - Review Authority

The appellant grieved her removal and the case proceeded to arbitration. The arbitrator issued a decision, finding that the agency proved its charges, but reducing the penalty to a time-served suspension. The appellant then filed a request with the Board for review of the arbitrator's decision.

Holding: The Board dismissed the request for review for lack of jurisdiction, finding that the appellant could have raised a claim of discrimination with the arbitrator but failed to do so. The appellant's vague allusion to discrimination in her brief to the arbitrator was insufficient for purposes of proving that she raised a discrimination claim under 5 U.S.C. § 2302(b)(1) with the arbitrator in connection with the underlying action.

1. The Board has jurisdiction over a request for review of an arbitration decision when the following conditions are met: (1) the subject matter of the grievance is one over which the Board has jurisdiction; (2) the appellant either (i) raised a claim of discrimination under 5 U.S.C. § 2302(b)(1) with the arbitrator in connection with the underlying action, or (ii) raises a claim of discrimination in connection with the underlying action under 5 U.S.C. § 2302(b)(1) for the first time with the Board if such allegations could not be raised in the negotiated grievance procedure; and (3) a final decision was issued. Here, conditions (1) and (3) are satisfied.
2. As to condition (2), the relevant negotiated grievance procedure permits allegations of discrimination. The appellant alleged that she raised allegations of discrimination in her grievance. However, to establish jurisdiction, she had to prove that she raised a discrimination claim with the arbitrator.
3. In her brief to the arbitrator, the appellant alluded to discrimination by asserting that the issue to be decided was whether the agency's actions violated fundamental due process and the collective bargaining agreement, and "were discriminatory." The brief did not elaborate on the generic reference to discrimination, and the arbitrator's decision did not address discrimination in any substantive way.
4. The Board concluded that the generic posing of the question, "was the removal discriminatory," without more, is insufficient for purposes of proving that the appellant raised a claim of discrimination under 5 U.S.C. § 2302(b)(1) with the arbitrator in connection with the underlying action. Accordingly, the Board dismissed the request for review for lack of jurisdiction.

Appellant: Kelly Lee

Agency: Department of Veterans Affairs

Decision Number: [2022 MSPB 11](#)

Docket Number: DE-0432-14-0448-I-1

Issuance Date: May 12, 2022

Appeal Type: Chapter 43

Board Procedures - Sanctions Performance-Based Actions

The appellant filed an appeal contesting the agency's decision to remove her for unacceptable performance pursuant to chapter 43. The parties stipulated that the only issue to be resolved was whether the

appellant was given a reasonable opportunity under the PIP to improve her performance above an unacceptable level. Prior to the telephonic hearing, the administrative judge issued an order requiring that all participating witnesses be sequestered, so that no witness other than the testifying witness should be present in the room at any given time. Following the hearing, the appellant filed a motion for sanctions, alleging that the agency allegedly violated the sequestration order. In support of her motion, the appellant provided an affidavit from one of her own witnesses, who stated that she “perceived” that all of the agency’s witnesses were present in the room while each witness testified because she heard multiple voices through the conference room wall. The agency denied violating the sequestration order, and provided signed affidavits to that effect from agency counsel and four agency witnesses. After reviewing the parties’ submissions, the administrative judge denied the appellant’s motion for sanctions without conducting an additional hearing.

Following a telephonic hearing, the administrative judge affirmed the removal, finding in relevant part that the agency proved by substantial evidence that the appellant’s performance was unacceptable after she was given a reasonable opportunity to improve. On review, the appellant did not dispute the merits of the initial decision, but argued that the administrative judge abused her discretion in connection with her motion for sanctions.

Holding: The Board found that the administrative judge did not abuse her discretion in denying the appellant’s motion regarding the sequestration of witnesses. However, the Board found that it was necessary to remand the case in light of the Federal Circuit’s recent decision in *Santos v. National Aeronautics & Space Administration*, 990 F.3d 1355 (Fed. Cir. 2021).

1. The Board found that, contrary to the appellant’s assertions on review, the administrative judge did not abuse her discretion in denying the appellant’s motion for sanctions without a hearing. The appellant did not request a hearing on the motion, either in the motion or at any time prior to the close of the record on review, nor did she identify any Board regulation requiring an administrative judge to resolve a post-hearing request for sanctions. Moreover, the administrative judge appropriately weighed the evidence in finding that the agency had not violated the sequestration order.
2. Consistent with existing precedent, the administrative judge did

not require the agency to prove that the appellant was performing unacceptably before her placement on a PIP. However, the Federal Circuit has since issued its decision in *Santos*, holding for the first time that to support a chapter 43 action, an agency “must justify institution of a PIP” by showing that the employee’s performance was unacceptable before the PIP.

3. Accordingly, the Board modified the standard applicable to chapter 43 actions in light of *Santos*. Specifically, to defend an action under chapter 43, the agency must prove by substantial evidence that (1) OPM approved its performance appraisal system and any significant changes thereto; (2) the agency communicated to the appellant the performance standards and critical elements of her position; (3) the appellant’s performance standards are valid under 5 U.S.C. § 4302(c)(1); (4) the appellant’s performance during the appraisal period was unacceptable in one or more critical elements; (5) the agency warned the appellant of the inadequacies of in her performance during the appraisal period and gave her an adequate opportunity to demonstrate acceptable performance; and (6) after an adequate improvement period, the appellant’s performance remained unacceptable in at least one critical element.
4. The Board further held that the Federal Circuit’s new precedent in *Santos* applies to all pending cases, regardless of when the events at issue took place. Here, the parties did not have the opportunity before the administrative judge to address the newly modified standard. Accordingly, the Board remanded the case for further adjudication of the appellant’s removal under the standard set forth in *Santos*.

COURT DECISIONS

NONPRECEDENTIAL:

Ziegler v. Department of the Interior, [No. 2022-1182](#) (Fed. Cir. May 6, 2022) (DE-3443-06-0454-C-3, DE-4324-21-0328-I-1)

Mr. Ziegler filed a Board appeal alleging that the agency discriminated against him in violation of USERRA by failing to select him for a supervisory position. The parties entered a settlement agreement, and twelve years later the appellant filed an appeal alleging that the agency had breached the agreement and had also violated USERRA through actions purportedly outside the scope of the settlement. The Board denied the appellant’s petition for enforcement,

finding that it was untimely and without merit, and dismissed his additional USERRA claims for lack of jurisdiction, finding that they were within the scope of the settlement agreement. The Federal Circuit affirmed.

Campion v. Department of Defense, [No. 2022-1236](#) (Fed. Cir. May 9, 2022) (DC-0752-21-0444-I-1).

Mr. Campion occupied a position that required him to maintain eligibility for access to classified information. Following a preliminary decision by the DOD Consolidated Adjudications Facility to revoke his eligibility for classified information, the agency placed him on indefinite suspension, and the Board sustained that action on appeal. On review, the Federal Circuit found that the Board correctly declined to hear Mr. Campion's whistleblowing claim, which is outside the Board's review authority, and that he failed to prove his harmful error and due process claims.

VanHorn v. Merit Systems Protection Board, [No. 2021-2204](#) (Fed. Cir. May 10, 2022) (DE-0890-21-0200-I-1)

Ms. VanHorn, a former USPS employee now on disability retirement, filed an appeal against OPM, alleging that OPM fraudulently deducted life insurance premiums from her retroactive lump sum payment and unlawfully terminated her health insurance. The Board dismissed the appeal for lack of jurisdiction, and the Federal Circuit affirmed.

Harris v. Department of the Army, [No. 2021-1022](#) (Fed. Cir. May 11, 2022) (SF-0752-21-0032-I-1)

The Federal Circuit dismissed the case for failure to prosecute because the petitioner failed to file the required brief within the time permitted by the court's rules.

Mynatt v. Merit Systems Protection Board, [No. 2022-1241](#) (Fed. Cir. May 12, 2022) (AT-0752-21-0278-I-2)

The Board dismissed Mr. Mynatt's appeal as moot after the employing agency rescinded his indefinite suspension. He appealed to the Federal Circuit, arguing that the Board erred in dismissing the appeal because his employing agency allegedly committed a due process violation when it failed to provide him with the materials it relied upon in proposing his indefinite suspension. The Federal Circuit affirmed the Board's decision, finding that Mr. Mynatt failed to make a nonfrivolous allegation that his appeal was not moot.

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